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NO.

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In the
Supreme Court of the United States

OCTOBER TERM, 1993

SECRETARY OF DEPARTMENT OF
REVENUE AND TAXATION
PLAINTIFF/RESPONDENT

VERSUS

VENTECH EQUIPMENT, INC.
DEFENDANT/RELATOR

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIRORI
BY RELATOR, VENTECH EQUIPMENT, INC.

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26pp

QUESTION PRESENTED

Petitioner sold and delivered a petroleum refinery by a contract that provided that the purchase price was "$3,360,000.00 (including sales taxes)." The courts of Louisiana held that Petitioner collected and must remit a sales tax even though the underlying transaction was not taxable.

The question presented in this case is whether the State of Louisiana can assess and collect $96,000.00 from Petitioner under its sales tax statutes when the underlying transaction at issue is not taxable.

PARTIES

Pursuant to Supreme Court Rule 14.1(b), the names of all parties to the proceeding appear in the caption of the case and are not restated here.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992-1993

SECRETARY OF DEPARTMENT OF
REVENUE AND TAXATION
PLAINTIFF/RESPONDENT

VERSUS

VENTECH EQUIPMENT, INC.
DEFENDANT/RELATOR

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIRORI
BY RELATOR, VENTECH EQUIPMENT, INC.

Petitioner, Ventech Equipment Company, Inc. ("Ventech" or "Petitioner"), a Texas corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal, First Circuit, dated November 20, 1992, which the Louisiana Supreme Court refused to review on May 7, 1993, and respectfully moves this Court to reverse that judgment and, if necessary, to remand this matter to the appropriate court for additional rulings.

JURISDICTION

The Louisiana First Circuit Court of Appeal affirmed the ruling of the trial court in favor of the Louisiana Department of Revenue and Taxation on November 20, 1992, in Case No. CA-91-1857 and Ventech's request for a rehearing was denied on March 4, 1993. A Petition for Writ of Certiorari And/Or Review was timely filed with the Supreme Court of the State of Louisiana but was denied, with one Justice dissenting, on May 7, 1993, in Case No. 93-C-0909. This Petition for Certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. 1257. The federal questions of Ventech's due process and equal protection rights being violated based on a judgment for sales taxes on a non-taxable transaction, which issues were raised in the trial court as well as in the Court of Appeal, First Circuit, State of Louisiana and the Supreme Court of the State of Louisiana.

STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment V:

> No Person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution Amendment XIV:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Louisiana Constitution Article VII:

Section 1. Except as otherwise provided by this Constitution, the power of taxation shall be vested in the Legislature, shall never be surrendered, suspended or contracted away, and shall be exercised for public purposes only.

Louisiana Constitution Article VII:

Section 2. The levy of a new tax, an increase in an existing tax, or a repeal of a tax exemption shall require the enactment of a law by two thirds of the elected members of each house of the Legislature.

Louisiana Civil Code Article 7:

Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act and derogation of such laws is an absolute nullity.

STATEMENT OF THE CASE

Petitioner purchased an entire petroleum refinery located at Venice, Louisiana from Gulf Oil Company. On November 12, 1982, Ventech sold a part of the refinery to GHR Energy Corporation. The part of the refinery sold

was called the Number Two Platforming Debutanizer (for convenience, called the "Unit"). The object of the contract *at issue in this case was immovable property* (i.e. real estate) under Louisiana property laws. The unit was a large petroleum refinery structure permanently imbedded in a concrete slab sitting on the ground in Venice, Louisiana. The Contract specified that after the sale, the unit would be dismantled at Venice, moved to Norco, Louisiana and reassembled exactly as it was in Venice, Louisiana, all for the price and sum of THREE MILLION THREE HUNDRED SIXTY THOUSAND ($3,360,000.00) DOLLARS..."including sales taxes."

Based solely on this wording of this contract, inserted in an abundance of precaution to protect the purchaser from any possible sales tax claim, the Louisiana Department of Revenue and Taxation assessed a NINETY-SIX THOUSAND ($96,000.00) DOLLARS sales tax on the transaction and sued to recover after Ventech disputed the assessment.[1] This dispute of the assessment and the manner in which it was assessed, i.e. based solely on the words "including sales taxes" in the contract and without any statutory support was raised at the trial level as well as on the appellate level both on initial appeal and request for rehearing as well as on Petiton for Writ of Certiorari to Louisiana Supreme Court. The Louisiana courts have held that the mere fact that the purchase price for the Unit stated "including sales taxes" is enough to make Ventech remit $96,000.00 for sales taxes to the State of Louisiana, even if the underlying transaction is not a transaction that is subject to Louisiana sales taxes.

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[1] As of April 26, 1993 the total amount of principal, interest and penalties claimed by the State is $277,747.68.

REASONS FOR THE ALLOWANCE OF THE WRIT

Since our country's founding, the premise upon which citizens can rely and feel protected is that there can be no taxation without representation. Similarly, citizens should feel equally protected by the premise that there can be no taxation without authorization. Public policy mandates that only those transactions specifically designated by legislative acts by a state can create a taxable event and that individuals and businesses have the right to freely contract with one another and not be subjected to arbitrary and capricious taxation when the taxing authority has no legal basis for such assessment. The unjustified attempt to collect taxes from Ventech, when they have not been expressly authorized by a statute, clearly violates the substantive due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution and in derogation of the express constitutional provisions of the State of Louisiana which require the Legislature to create and levy taxes.

What has, in essence, occurred in this case is that the Louisiana Department of Revenue and Taxation has assessed and attempts to collect a tax for which there is absolutely no statutory or constitutional authority and is basing this right to assess and collect solely and exclusively on the language of a contract. The attempt to assess and collect is without proper statutory basis and the fact that the subject sale is a non-taxable event is a deprivation of Ventech's substantive due process rights of the Fifth and Fourteenth Amendments of the United States Constitution and Article VII of the Louisiana Constitution.

Sections 1 and 2 of Article VII of the Constitution of the State of Louisiana set up a State public policy that all taxation is created, imposed, assessed and collected by constitutional or legislative mandate. A tax obligation arises only when a tax become due upon a statute levying that tax, *McNamara v. Bayou State Oil Corporation*, 589 So.2d 1099 (La. App. 2nd Cir., 1991), and such obligation cannot be created or imposed by the verbiage used in a contract between private parties. Further, legislation enacting taxes and any rights related to those taxes such as levying, collection and assessment must be in clear statutory language. *Standard Oil Company of New Jersey v. Collector of Revenue*, 210 La. 428, 27 So.2d 268 (1946). The Louisiana Department of Revenue and Taxation can show no statutory authority whatsoever which can support its claim for this assessment as there is, as a matter of law, no legislative authority for the actions which it is taking.

The analysis by the lower courts in supporting the position of the Louisiana Department of Revenue and Taxation is incorrect and should be reviewed and reversed by this Court. Initially, and most simply, is the fact that at the time of the sales contract, the Unit was immovable property under Louisiana property laws and there is no Louisiana sales tax charged on the sale of an immovable property. The property laws of Louisiana are clear in that the character of property is to be determined at the time of the sale and as the Unit was immovable on November 12, 1992, no sales tax can be charged. Further, the Louisiana Department of Revenue and Taxation has not alleged, and there exists no other basis, for a claim that such sales tax would be due under Louisiana law.

The Louisiana Department of Revenue and Taxation and the courts have ignored the law that no such tax is due but are merely relying on a false premise that just because sales taxes are mentioned in the contract, they must have been collected and must be remitted.

The First Circuit, on its original opinion on page 1, stated that the trial Court held that:

> " . . .The purchase price for the Unit included an amount for sales tax which was collected by Ventech, thereby giving rise to its legal obligation to remit a tax to the State of Louisiana. We find (this) Finding of Fact correct. . ."

The Court of Appeal did not address Petitioner's pleas that the underlying transaction in this case is not taxabale. We submit that this reasoning violates all rules and legal principles known to free man. A Government cannot reach into the pockets of its citizens without a statutory basis to collect a tax. To do what the State of Louisiana has done in this case amounts to simple confiscation.

The sole and only authority cited by the State of Louisiana and the Court below is *Sabine Pipe & Supply Company v. McNamara*, 411 So.2d 1167 (La. App. 1st Cir., 1982). This case held that when Sabine Pipe collected sales taxes from its customers, it must remit them to the State of Louisiana. However, in the *Sabine* case, the underlying sales were truly taxable transactions. Sabine Pipe is simply a collection case without a valid defense and offers no support to the Louisiana Department of Revenue and Taxation. The contract, here being the purchase agreement,

cannot in and of itself create a taxable event absent specific statutory authority. Although parties to a contract are certainly free to stipulate as they please, they cannot stipulate contrary to public policy. La. Civil Code Art. 7, *Theatre Time Clock, Inc. v. Stewart,* 276 F.Supp. 593 (E.D., La., 1967); *Bergeron v. Mumphrey,* 38 So.2d 411 (La. App. Orleans Cir., 1949). By allowing the tax to be assessed in this basis, the Louisiana courts are not only denying Petitioner proper due process, but are creating a taxing authority without any lawful support whatsoever.

CONCLUSION

Louisiana Constitution Article VII, Sections 1 and 2 provide that only the Legislature can exercise the power of taxation. In this case, the Courts of Louisiana have violated these Louisiana constitutional provisions by ordering a citizen to pay a tax based solely on its contractual interpretation that a purchase price included sales taxes on a clearly *non-taxable* sale. This violation of the express provisions of the Louisiana Constitution constitutes and is a per se violation of the Fifth and Fourteenth Amendments to the United States Constitution.

For all of the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Louisiana Supreme Court and that after due proceedings, the judgment and the opinion should be vacated. In the alternative, Ventech seeks to have this matter remanded to the appropriate court for review on the issue to determine whether or not a taxable transaction has in fact occured and to afford proper due process rights to Ventech in this regard.

Respectfully submitted,

BY: _____

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Counsel of Record
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& McPHERSON
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New Orleans, Louisiana 70112
Telephone: (504) 581-9444
Attorney for Ventech Equipment, Inc.,
Defendant/Relator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing pleading has been served upon counsel for all parties to this proceeding by mailing the same to each by First Class United States Mail, properly addressed and postage prepaid on this 2nd day of August, 1993.

_____

RADER JACKSON

APPENDIX A

THE SUPREME COURT
OF THE STATE OF LOUISIANA

SHIRLEY McNAMARA, SECRETARY,
DEPARTMENT OF REVENUE AND
TAXATION, STATE OF LOUISIANA

VS. No. 93-C-0909

VENTECH EQUIPMENT, INC.

— — — — — —

IN RE: Ventech Equipment Inc.; - Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA91 1857; Parish of East Baton Rouge Nineteenth Judicial District Court Div. "F" Number 284,098

— — — — — —

May 7, 1993

Denied.

PFC

JLD

JCW

HTL

PH

CDK

ORTIQUE, J., would grant the writ.

MARCUS, J., not on panel.

Supreme Court of Louisiana
May 7, 1993

/s/ Illegible

Clerk of Court
For the Court

APPENDIX B

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

Post Office Box 4408

Baton Rouge, Louisiana 70821-4408

Docket Number : 91/CA/1857

DATE: NOV 20 1992

SECRETARY OF DEPARTMENT OF
REVENUE & TAXATION

VERSUS

VENTECH EQUIPMENT, INC.

TO:

Rader Jackson
1010 Common St. , Ste 1500
New Orleans, La 70112

Geneva Landrum
P.O. Box 4064
Baton Rouge, LA 70821

NOTICE OF JUDGMENT

You are hereby served with a copy of the opinion in the above entitled case.

Your attention is invited to Rule 2-18 (Rehearing) of the Uniform Rules of the Courts of Appeals, effective July 1, 1982.

I hereby certify that this opinion and notice of judgment were mailed to the trial judge, the clerk of the trial court, all appeal counsel of record, and all parties not represented by counsel this date.

/s/ Karen West
STANLEY P. LEMOINE, CLERK
COURT OF APPEAL, FIRST CIRCUIT

AMENDED

TIME DELAY FOR REHEARING, C.C.P. ART. 2166; C.Cr.P. ART. 922; Act No. 451, EFFECTIVE AUGUST 30, 1983.

FEE FOR REHEARING, R.S. 13:352, AS AMENDED, EFFECTIVE AUGUTST 30, 1986.

SHIRLEY McNAMARA, SECRETARY DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA

VERSUS

VENTECH EQUIPMENT, INC.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

CA 91 1857

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, IN AND FOR THE PARISH OF EAST BATON ROUGE, NO. 284,098, HONORABLE FRANK J. SAIA, JUDGE PRESIDING.

BEFORE: EDWARDS, SHORTESS AND WHIPPLE, JJ.

EDWARDS, J.

NOV 20 1992

The defendant, Ventech Equipment, Inc., appeals a judgment rendered against it, in the full sum of $96,000 plus statutory interest, penalties and attorneys fees, representing unremitted sales tax which the trial court found was owed by it to the plaintiff, Department of Revenue and Taxation. For the following reasons, we affirm the judgment of the trial court.

By way of contract, dated November 12, 1982, Ventech sold part of a petroleum refinery, a No.2 Platforming Dubutanizer (hereinafter referred to as platforming

unit), to GHR Energy Corporation,. Subsequently, the Department of Revenue and Taxation performed a field audit examination and assessed a $96,000 sales tax on the sale, and filed a petition in district court to recover the tax. The trial court found that the assessment was valid, and rendered judgment against Ventech ordering it to pay the department the full sum of $96,000 plus statutory interest, penalties and attorneys fees. The trial court based its judgment on two findings of fact: that the unit sold was a "Movable" and thereby subject to the Louisiana sales tax laws, and also that the purchase price for the unit included an amount for sales tax which was collected by Ventech, thereby giving rise to its legal obligation to remit a tax to the State of Louisiana. Ventech assigns error to each of these findings of fact. We find that the second finding of fact made by the trial court was correct as well as dispositive of the issue at hand. Therefore, we pretermit discussion of the first assignment of error.

In *Sabine Pipe & Supply Company v. McNamara*, 411 So.2d 1167, 1169 (La. App. 1st Cir.,) *cert. denied*, 414 So.2d 1254 (La. 1982), we held that since LSA-R.S. 47:306 and 47:318 require that taxes collected from purchasers must be remitted to the Secretary [Department of Revenue and Taxation], then once a seller collected a tax, the State can compel it to remit the tax to Louisiana. In **Sabine** , the seller admittedly withheld and collected amounts equivalent to Louisiana sales or use tax from its Louisiana customers, and was thereby ordered to remit such taxes to the state. In the instant case, Ventech denies that it collected a sales tax from its purchaser. However, we have reviewed the evidence and find that the trial court's finding that such tax was collected by Ventech is amply supported

by the record and documents.

The pertinent evidence consists of two separate documents, each entitled "SALES AGREEMENT PLATFORMER UNIT." The first, accompanied by a transmittal letter dated October 1, 1982, is a proposed draft (hereinafter referred to as draft) of an offer outlining the terms and conditions of the sale, executed by the buyer, GHR. This agreement was never signed by Ventech. The second document, dated November 12, 1982, is the final contract (hereinafter referred to as contract) which perfected the sale of the unit. The purchase price for the unit in both of these documents is the same; however, the language pertaining to the purchase price is slightly varied.

The draft provided as follows:

> 1. *Price and Terms.* PURCHASER shall pay the sum of THREE MILLION TWO HUNDRED THOUSAND DOLLARS ($3,200.000), plus applicable taxes as provided in Exhibit "B", attached hereto and made a part hereof.

Exhibit "B" is a payment schedule, with a heading which reads: TOTAL PURCHASE PRICE IS $3,360,000. Following this heading is a list of eight payments made, totalling $900,000, the balance of the purchase price, listed at $2,360,000, followed by a paragraph of terms and conditions for payment of the balance, and the following: $3,360,000 Total, including $160,000 for Sales Tax.[1]

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[1] The scheduled payments were listed as lump sums and did not specify an allotment for sales tax. However, Mr. Winn, a field agent with the Department of Revenue, testified that typically, when a contract pro-

The contract provided as follows:

> 1. *Price and Terms.* The total purchase price, and payment therefore, of the GOODS shall be THREE MILLION THREE HUNDRED SIXTY THOUSAND DOLLARS ($3,360,000), including sales taxes, as provided in Exhibit "B", attached hereto and made a part thereof.

Exhibit "B" is a payment schedule which provides at the top: Total Purchase Price - $3,360,000 (including sales tax). Following, is a list of payments made, payments owed and provisions regarding the mode of payment for the balance.

Both documents clearly reflect the inclusion of sales tax as part of the negotiated purchase price, yet Ventech contends that it neither charged nor received sales tax on the transaction. Mr. Bill Stanley, vice-president of Ventech, testified that the proposed draft was not accepted by Ventech because during the negotiations, Ventech reached an internal conclusion that the sale was not a taxable transaction. His explanation for why the contract still stated "including sales tax" was that it "was meant as a hold harmless against Goodhope bearing any tax." However, the total purchase price in both documents is, nevertheless, the same. When asked by the trial court why the purchase price was not reduced by the $160,000 which had been previously negotiated as sales tax, Mr. Stanley explained that the same price now covered ad-

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Footnote 1 continued.

vides for progress payments, the sales tax is specified in the contract (as was done in this case), but not necessarily broken out of each scheduled payment.

ditional work which had not been in the proposed draft.

In its reasons for judgment, the trial court remarked, "But the price coincidentally changed a hundred and sixty thousand, the amount of the two taxes that the parties had at least agreed on....[t]hat's just too much of a coincidence for me to ignore." Based on the evidence in this record, and the clear wording of the contract, we find no abuse of the trial court's discretion. Accordingly, we affirm the judgment of the trial court. Ventech is assessed all costs of this appeal.

AFFIRMED.

APPENDIX C

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

RE: Docket Number 91/CA/1857

SECRETARY OF DEPARTMENT
OF REVENUE & TAXATION

--VERSUS-- Parish of
East Baton Rouge

VENTECH EQUIPMENT, INC.

On application for Rehearing.

Rehearing DENIED

/s/ Wallace A. Edwards
WALLACE A. EDWARDS

/s/ Melvin A. Shortess
MELVIN A. SHORTESS

/s/ Vanessa Guidry-Whipple
VANESSA GUIDRY-WHIPPLE

Filed MAR 04 1993

/s/ S. anley P. Lemoine
STANLEY P. LEMOINE, Clerk